Petition

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

PEOPLE OF THE STATE OF CALIFORNIA, AND THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN LUIS OBISPO,

Petitioners,

v.

WALTER MADISON TUTTLE and RONALD DOUGLAS ENRIGHT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Attorney General of the State of California
ROBERT H. PHILIBOSIAN, Chief Assistant Attorney General - Criminal Division
ARNOLD O. OVEROYE
Assistant Attorney General
EDMUND D. McMURRAY
Deputy Attorney General
WM. GEORGE PRAHL
Deputy Attorney General

555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-0914

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether a state's statutory requirement of good cause for issuance of a search warrant authorizing nighttime service is mandated by the constitution.

2. Whether the Fourth Amendment requires that the good cause showing which must be made under Penal Code section 1533 for nighttime service of a search warrant must be synonymous with probable cause or whether a lesser standard may be used.

3. Whether the good cause showing which must be made to permit the search of a rural encampment to be made at night is less than is necessary for a similar search of an inhabited dwelling.

4. Whether the affidavit in support of the search warrant in the instant case contained sufficient facts to

justify a nighttime search.

5. Whether there is any reason for applying the exclusionary rule to a situation where the police have relied in good faith upon the magistrate's determination that there was sufficient facts to justify the nighttime service of a search warrant.

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OPINIONS BELOW

The opinion of the California District Court of Appeal for the Fifth Appellate District granting respondent's petition for a writ of prohibition which was filed on June 12, 1981, and is reported at 120 Cal.App.3d 320,

174 Cal.Rptr. 576. The opinion is reproduced as Appendix "A". A timely petition for hearing was thereafter filed in the California Supreme Court on July 22, 1981. That court filed an order denying hearing on August 17, 1981.[1/]

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a state's statutory requirement of good cause for issuance of a search warrant authorizing night-time service is mandated by the constitution.

2. Whether the Fourth Amendment

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1. The order of the California Supreme Court denying the petition for hearing is reproduced as Appendix "B".

requires that the good cause showing which must be made under Penal Code section 1533 for nighttime service of a search warrant must be synonymous with probable cause or whether a lesser standard may be used.

3. Whether the good cause showing which must be made to permit the search of a rural encampment to be made at night is less than is necessary for a similar search of an inhabited dwelling.

4. Whether the affidavit in support of the search warrant in the instant case contained sufficient facts to justify a nighttime search.

5. Whether there is any reason for applying the exclusionary rule to a situation where the police have relied in good faith upon the magistrate's determination that there was sufficient

facts to justify the nighttime service of a search warrant.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth Amendment and Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On July 28, 1980, a complaint was filed in the Paso Robles Municipal Court charging respondents, Walter Tuttle and Ronald Enright, and a co-defendant named Michael Diener, with violations of California Health and Safety Code sections 11358 and 11359.

On September 25, 1980, and October 9, 1980, a preliminary hearing was conducted and at the conclusion of that hearing respondents were held to answer.

Sometime in October of 1980, a

two-count information was filed in the San Luis Obispo County Superior Court charging respondents and codefendant Diener with violations of California Health and Safety Code sections 11358 and 11359.

On November 10, 1980, respondents filed a motion to dismiss the information pursuant to California Penal Code section 995.

The motion was heard on February 3, 1981.

On February 4, 1981, the Superior Court of San Luis Obispo County denied respondents' motion.

On February 17, 1981, respondents filed a petition for a writ of prohibition and/or mandamus in the Fifth District Court of Appeal.

On March 9, 1981, the court issued

an order to show cause.

The return was filed on March 30, 1981, with a reply being filed on April 9, 1981.

Oral argument was held on May 12, 1981. At oral argument the court requested additional briefing on the issue of what remedy is appropriate if Penal Code section 1533 has been violated.

Both parties filed additional briefs on May 26, 1981.

The court filed its opinion granting the petition on June 12, 1981.

STATEMENT OF FACTS

On July 7, 1980, California Department of Justice Special Agent Garry Wilson was contacted by Detective Bruce Corell of the Santa Barbara County Sheriff's Office. Correll told Wilson that in June of 1980 he had been on property in the Shandon area of San Luis

Obispo County belonging to Don McCormack and that while he was there, he had observed an area of green growth on the adjoining property. Correll said he had looked at the area of green growth with binoculars and observed a cultivated area that was out of the ordinary in the Shandon area. (Search Warrant Affidavit, pp. 2-3).

Correll also told Wilson that he had received information from other persons that a man named Mike Diener had been seen carrying firearms on that property.

On July 10, 1980, Department of Justice Agent Fox, Detective Correll and a lab technician named Brower flew over the site and surrounding area. Agent Fox passed over the property twice at an elevation of not lower than 1,000 feet. Agent Fox observed a garden area

of approximately 1/3 to 1/2 acres which contained approximately 100 plants of various sizes, most of which were about six (6) feet in height. Within a few hundred feet of this garden area was a reservoir containing a quantity of water with trails from the reservoir leading to the garden area. (Search Warrant Affidavit, p. 3).

Agent Fox also observed tents and other structures within 200-300 feet of the garden area, with trails from these tents and structures to the area containing the plants. Agent Fox observed several vehicles in this same vicinity and three or four individuals within the garden area itself and other persons standing adjacent to the garden area. Agent Fox further noted that the color, general shape and outline of the plants

appeared to be marijuana and that the smaller, lighter green plants appeared to be younger marijuana plants growing among the older plants.

Agent Fox further noted that the suspected plants were not consistent with any natural foliage contained in the area and that the 1/3 to 1/2 acre parcel did not appear consistent with any legitimate gardening operation. The garden area appeared out of place and isolated. Agent Fox told Agent Wilson that his observations were made without the aid of any optical devices. (Search Warrant Affidavit, p. 3).

After the aerial observations, Detective Jeff Trippon of the Paso Robles Police Department contacted Agent Wilson and told him that he had received information that Mike Diener had a cultivation

site in the Shandon area of San Luis Obispo County. (Search Warrant Affidavit, p. 3).

On July 14, 1980, the officers reviewed county assessor's records and determined that petitioner Walter Tuttle and his wife were the listed owners of the property.

The officers obtained a search warrant from Judge Conklin of the San Luis Obispo Municipal Court on July 17, 1980. The warrant authorized nighttime service pursuant to Penal Code section 1533.

Thirteen officers of the San Luis Obispo County Sheriff's Department Special Enforcement Detail arrived at the property boundary around 4:00 or 4:30 a.m. and walked from there to the encampment. They were in position to serve the warrant at about 5:50 a.m. on

July 18, 1980 (PHT 82).[2/]

Deputy Sheriff Don Mansfield was in charge of the unit and he had the assignment of using a bullhorn to notify the persons occupying the area of the search (PHT Vol. I, p. 82). As Sergeant Mansfield was unwinding the bullhorn, petitioner Diener cane out of the trailer and quieted a barking dog. Diener went back into the trailer and came out shortly thereafter carrying a double-barrelled shotgun (PHT Vol. I, p. 82). Diener walked to the brushy area where Sergeant Mansfield and another deputy sheriff were concealed.

Diener was looking toward the marijuana plants which were being grown in the area behind where Mansfield was

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2. "PHT" refers to the preliminary hearing transcript of the muncipal court proceedings.

hiding. Suddenly Diener swung the shotgun toward Mansfield and the other officer (PHT Vol. I, p. 83).

The officers rolled away in opposite directions, Mansfield yelled, "This is the Sheriff's Department, freeze" and then both officers began firing at Diener (PHT Vol. I, p. 83).

Diener was wounded and fell to the ground (PHT Vol. I, p. 83).

Mansfield then yelled that it was the Sheriff's Department SWAT Team and that the encampment was surrounded and that everybody should come out with their hands up (PHT Vol. I, p. 84).

Mansfield then heard a voice coming from the area where the tents were and petitioner Enright said, "I'm coming out" (PHT Vol. I, p. 84).

Mansfield then repeated his warning

and a boy came out of the trailer (PHT Vol. I, p. 84). Once the area was secured, the narcotics units were called in and Diener was given medical care (PHT Vol. I, p. 84).

The narcotics officers searched several acres of the seven hundred and twenty acre parcel. They found two tents set up in the area along with a trailer and a diesel generator hooked up to a water pump (PHT 34). The officer found approximately five hundred and sixty marijuana plants of varying sizes (PHT 35). There was also about 48 pounds of dry marijuana in one of the tents (PHT 35). Several loaded weapons were found as well as irrigation equipment (PHT 35-36).

In the tent where the officers discovered the dried marijuana they also

found various pieces of paper and receipts in the name of Walt Tuttle and Mike Diener (PHT 35-38).

ARGUMENT

I

PENAL CODE SECTION 1533'S STATUTORY REQUIREMENT OF GOOD CAUSE FOR ISSUANCE OF A SEARCH WARRANT AUTHORIZING NIGHTTIME SERVICE IS NOT MANDATED BY THE FEDERAL ONSTITUTION

There seems to be little dispute that pre-Fourth Amendment common law contained an aversion to nighttime searches. (United States ex rel. Boyance v. Myers (3rd Cir. 1968) 398 F.2d 896; Search and Seizure, LaFave, § 4.7, p. 119; 79 C.J.S. § 83 (p)(2), p. 900.)

The common law's strong aversion against nighttime service of search warrants was specifically designed to protect the expectations of privacy a

person has in his own home. (United States v. Gibbons (10th Cir. 1979) 607 F.2d 1320.)

In its decision, a majority of the Fifth District Court of Appeal specifically found that contrary to this Court's holding in Gooding v. United States (1974) 416 U.S. 430 and the holdings in United States v. Searp (6th Cir. 1978) 586 F.2d 111, cert.den., 440 U.S. 921 and People v. Glass (1976) 56 Cal.App.3d 368, the good cause requirement set forth in Penal Code section 1533 is a matter of federal constitutional dimension and that the evidence seized before 10:00 a.m. must therefore be suppressed under the Fourth Amendment.

Petitioners respectfully submit that certiorari must be granted in this case to settle the important and now conflicting question of whether Penal

Code section 1533's statutory requirement of good cause for issuance of a search warrant authorizing nighttime service is also a constitutional requirement.

In the District Court of Appeal, petitioners argued that based on the varying standards used by other states and the federal government, and even the complete absence in some jurisdictions of any special requirements for the issuance of a warrant authorizing nighttime service, it can hardly be said that California's statutory scheme for authorizing nighttime service is deeply rooted in the Fourth Amendment to the Federal Constitution.

Thus, it has long been the rule that the federal constitution is not violated by state statutes which authorize

service of search warrants without limitation as to the hour or without any showing of good cause for night service (Voorhies v. Faust (Mich. 1922) 189 N.W. 1006; Siragusa v. State (Tex. 1932) 54 S.W.2d 107.)

One commentator has pointed out that:

> "The restriction of the execution of search warrants to daytime hours, absent some special showing and authorization, is mandated by statute or court rule in 23 states; 14 other states explicitly authorize execution at any time while the remaining states have no pertinent provision." (LaFave, supra, § 4.7(b), p. 116.)

Thus, a significant number of jurisdictions are within the Fourth Amendment even though they either provide for

service of a search warrant at any time or are silent on the question.

Furthermore, even among those jurisdictions which require some type of showing be made to authorize nighttime service, the standards employed by these jurisdictions vary so markedly that something approaching constitutional uniformity cannot be found.

For example, within the federal system, it is Rule 41(c) of the Federal Rules of Criminal Procedure which allows federal judges to authorize nighttime service of search warrants.

Under Rule 41(c), warrants may issue on probable cause for searches to be conducted during the daytime but searches after dark require "positive information."[3/]

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3. It should be noted that under (continued)

Under Rule 41(c) the hours of sunrise and sunset are not controlling and the test is whether there is light enough to read the warrant or to identify a person's features. (U.S. Internal Revenue Service v. Gibbs (D.C. Pa. 1964) 233 F.Supp. 934.)[4/]

The disparity among the various jurisdictions on the question of how to deal with the nighttime service of search warrants does not suggest that California's statutory answer to this

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Footnote 3 continued:

18 U.S.C. § 1405 searches involving narcotics may be made without the showing required by Rule 41(c) if made at nighttime (see also 19 U.S.C. § 1595.)

4. Thus, under Rule 41(c) the search in the instant case would not have been considered to be a nighttime search because there was sufficient light to allow Sgt. Mansfield to see codefendant Diener.

question is mandated by the Constitution.

II

THE FOURTH AMENDMENT DOES NOT MANDATE THAT THE GOOD CAUSE SHOWING WHICH IS REQUIRED BY PENAL CODE SECTION 1533 FOR NIGHTTIME SERVICE OF A SEARCH WARRANT BE SYNONYMOUS WITH PROBABLE CAUSE AND IN FACT USE OF A LESSER STANDARD IS PERMISSIBLE

California enacted its provision regarding nighttime service of search warrants in 1872. In its original form, Penal Code section 1533 permitted service of a search warrant at any time of the day or night if the affidavits are positive that the property is on the person or in the place to be searched.

Penal Code section 1533 was amended in 1961 to its present form which now provides:

"Upon a showing of good cause,

the magistrate may, in his discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 o'clock a.m. and 10 o'clock p.m." (Emphasis added.)

Thus, California has apparently gone from requiring that the affidavits be positive to requiring a mere showing of good cause without offending either the State or Federal Constitutions.

A decision by this Court is necessary in the instant case to settle the important question of whether the Fourth Amendment mandates that the good cause provision of Penal Code section 1533 be regarded as being synonymous

with probable cause or whether section 1533 may constitutionally require a lesser showing.

It is petitioners' contention that nothing in the Fourth Amendment requires an independent showing of probable cause before a warrant may be endorsed for the nighttime service under Penal Code section 1533.

For example, in People v. Watson (1977) 75 Cal.App.3d 592, 598, the court stated the proper standard for "good cause" under section 1533 as follows:

> ". . . [T]he affidavit furnished the magistrate must set forth specific facts which show a necessity for service of the warrant at night rather than between the hours of 7 a.m. and 10 p.m. This means that the magistrate must be informed of facts from which it reasonably

may be concluded that the contraband to be seized will not be in the place to be searched during the hours of 7 a.m. to 10 p.m."

(Emphasis added.)

There is nothing in Watson or any other state or federal case which suggests that this factual showing must rise to the level of probable cause. Thus, prior to Watson, it was a well-established rule that Penal Code section 1533 does not require a separate statement as to good cause for the serving of the warrant at nighttime. (In re Donald R. (1978) 85 Cal.App.3d 23, 26; People v. Walker (1967) 250 Cal.App. 2d 214, 219.) If the affidavit, read in a commonsense manner and as a whole, supports the inference that the interests of justice are best served by authorization of nighttime service, provision for

such service in the warrant is proper. (People v. Mardian (1975) 47 Cal.App. 3d 16, 35.) Absent an abuse of discretion, the magistrate's finding of a reasonable necessity of nighttime service should not be disturbed on appeal. (Solis v. Superior Court (1966) 63 Cal.2d 774, 776-777; People v. Mardian, supra, at p. 35; People v. Walker, supra, at pp. 219-220.)

Here, good cause consisted of a showing that the safety of the police officers who were to execute the warrant justified an authorization allowing them to conduct the search at night.

There seems to be no real doubt that officer safety is a factor upon which a magistrate may legitimately rely to authorize nighttime service. The initial question presented in this case is whether the showing which must be made

to authorize nighttime service will be tested under traditional probable cause standards or whether the "good cause" provision of section 1533 allows a warrant to be endorsed for nighttime service upon a lesser showing. The legislative history surrounding Penal Code section 1533 suggests that probable cause is not the appropriate standard.

Thus, by the time section 1533 was amended in 1961, the term "probable cause" as it is used in the warrant process already had a well established meaning.

For example, the term "probable cause" is used in the Fourth Amendment itself. Similarly, the term "probable cause" appears in Penal Code section 1525 which sets forth the standard for issuance of a search warrant. Penal Code section 1525 was enacted in 1872.

By 1961, California and Federal case law had also defined the types of evidence which could be used to establish probable cause for issuance of a search warrant.

Rather than incorporate all of these well-established and well understood concepts into the nighttime authorization section by simply using the term "probable cause," the Legislature instead used the term "good cause" when it amended section 1533 in 1961.

It is petitioners' contention that the California Legislature did not use the term "probable cause" for a reason.

Thus the authorization for nighttime service is only an ancilliary part of the warrant and need not be based on the same stringent standards as the substantive portions of the warrant.

This is the precise holding of

Commonwealth v. Baldwin (Pa. 1978) 384 A.2d 945.

In Baldwin an attorney telephoned the police and alerted them to a marijuana sale involving four pounds of marijuana which would take place that evening between the attorney's son and Baldwin. The sale was to take place at Baldwin's house. The police watched the house and saw the juvenile enter and leave. When he left, the juvenile was carrying a paper bag. The police stopped the juvenile's car and he consented to a search of the bag which contained one pound of marijuana. The officers then obtained a search warrant for Baldwin's house. The warrant was endorsed for nighttime service under Pennsylvania law.

Pennsylvania required a showing of "reasonable cause" for issuance of a warrant authorizing nighttime service.

The trial court in Baldwin found the reasonable cause provision to be synonymous with probable cause and ordered the evidence suppressed. The appellate court reversed and held that:

> "Put simply, the affidavit for a warrant authorizing a nighttime search must show both probable cause and some reason why the search cannot wait until morning."
> (384 A.2d at p. 948.)

In the instant case the majority of the Fifth District Court of Appeal rejected the statement in the search warrant affidavit regarding the information which had been obtained that codefendant Diener had been seen carrying firearms on the rural cultivation site because there was no showing of reliability for this information.

The requirement of reliability for

hearsay information has traditionally been applied to the substantive portions of search warrant affidavits when they are tested for probable cause. (Aguilar v. Texas (1964) 378 U.S. 108, 114.)

In the instant case it is submitted that the rationale of the Baldwin case and the legislative history behind Penal Code section 1533 compels a finding that the good cause provision in section 1533 is not synonymous with probable cause and that the lower court erred in this case when it held that the contrary was a constitutionally compelled rule.

III

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT IN THE INSTANT CASE ESTABLISHED GOOD CAUSE TO ALLOW NIGHT-TIME SERVICE

It is petitioners' contention that the instant petition must also be granted to settle the important question of

whether the affidavit in support of the search warrant in this case alleged sufficient facts under the Fourth Amendment to justify endorsing that warrant for nighttime service.

Petitioners' argument on this issue is twofold. First, it is petitioners' contention that since the warrant was only being sought for a rural agricultural encampment, less cause had to be shown under the constitution to justify a nighttime search than is necessary for a nighttime search of an inhabited urban dwelling. (See Camara v. Municipal Court (1967) 387 U.S. 523; United States v. Gibbons, supra.

Second, even if the phrase "good cause" is synonymous with the term "probable cause," the showing made in the instant case was constitutionally adequate.

A. The Good Cause Showing Which Must Be Made To Search A Rural Encampment Is Far Less Than That Necessary To Search An Urban Residence

It is not at all clear that the common law's disfavor with nighttime searches extended to isolated rural encampments such as the one which respondents had established to grow their marijuana.

Here, the trial judge at the preliminary hearing specifically found that "less cause need exist for the execution of a nighttime search of an open area than is required for that of a house or fully enclosed premises" (PHT 26).

Certainly, one who grows marijuana in a rural encampment cannot claim the same reasonable expectation of privacy as that held by the occupant of an urban dwelling. (People v. St. Amour (1980) 104 Cal.App.3d 886; People v.

Joubert (1981) 118 Cal.App.3d 637.)

An example of the application of this principle is United States v. Gibbons (10th Cir. 1979) 607 F.2d 1320.

In Gibbons a trunk was delivered to the airline terminal in Phoenix in the late evening hours for shipment on a direct flight to Oklahoma City. The airline clerk became suspicious because he recognized that the address where the trunk was being shipped was a parking lot and because the locks on the trunk were brand new and high security type while the trunk itself was delapidated. When the clerk moved the trunk for shipment, a small tinfoil packet bearing the word "Quaalude" fell out. Arizona state authorities were called and they secured a search warrant which was executed at nighttime.

In finding the search lawful, the Federal Circuit Court held that:

> "Although we are confronted with a nighttime search, it is not one which intrudes into a home or is carried out by physically disturbing the owner or the person who has an interest in the personal property involved. Thus at the outset, we have a case where the circumstances are not strong for claiming unreasonableness in this nighttime search." (607 F.2d at 1327.)

Therefore, since the search in the instant case did not involve an inhabited swelling, less cause was needed to establish good cause.

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B. Even If The Phrase "Good Cause" As It Is Used In Penal Code Section 1533 Is Synonymous With Probable Cause And The Showing In The Affidavit Must Be Tested Against Traditional Probable Cause Concepts, The Showing In This Case Was Adequate

Good cause existed under the facts of the present case for an order allowing nighttime service since the magistrate was correct in ruling that less cause need exist for the execution of a nighttime search of an open area or field such as in the case at bar than is required for that of a house or fully enclosed premise. More importantly, the protection of the officers who must conduct the search comes within the interests of justice and is a legitimate factor which may be taken into account by the magistrate. (People v. Zepeda (1980) 102 Cal.App.3d 1, 6.)

This factor was established by the

general allegation contained in the affidavit at page 4 ("Your affiant is also aware that instances of escape and carrying of firearms are becoming more common in the service of search warrants on remote cultivation sites in California. For the above reasons, your affiant requests authorization for service at any time of the day or night which would facilitate the service of the warrant early in the morning hours while residents are still sleeping."); and by the specific allegation as found on page 3 of the Affidavit in Support of the Search Warrant ("Detective Correll stated that he has received information from other persons that Mike Diener has been seen carrying firearms on the property.") These facts clearly establish the officers' concern for their personal safety in executing a search

warrant in a rural, isolated cultivation site. Based on these facts the magistrate was properly within his discretion in finding just cause for a nighttime search. Moreover, the magistrate's decision to allow the officers to conduct the search in the early morning hours when he and they felt it would be safer is not one which should be second-guessed later on but rather is a discretionary choice on the magistrate's part and should be given great weight unless it is shown to be clearly erroneous.

IV

EVEN IF THE AFFIDAVIT IN SUPPORT OF THE WARRANT FAILED TO ESTABLISH GOOD CAUSE TO AUTHORIZE NIGHTTIME SERVICE, THE ERROR CERTAINLY DOES NOT REQUIRE APPLICATION OF THE EXCLUSIONARY RULE

It is petitioners' further contention that under the facts of the present case no purpose of the exclusionary

rule would be served by suppression of the evidence obtained from service of the instant search warrant.

Admittedly in Call v. Superior Court (Humboldt County) (1968) 266 Cal. App.2d 163, the court ordered evidence suppressed where officers had served a warrant at nighttime although the warrant did not authorize a night search.

In Call, however, the officers had specifically requested authorization for nighttime service but the magistrate neglected to indicate on the warrant any decision he may have reached in that regard.

The warrant in Call was issued under the previous language in section 1533 which required the magistrate to insert a directive in the warrant in order to authorize nighttime service.

In Call the warrant was served at

night by officers who apparently realized that the magistrate had not authorized such service although he had been specifically asked to do so. Under these facts, the appellate court ordered that the evidence seized pursuant to the warrant must be suppressed.

It is petitioners' contention that the facts of the present case are much closer to those presented in United States v. Searp (6th Cir. 1978) 586 F.2d 1117, cert.den., 440 U.S. 921 (1978).

In Searp FBI agents and Kentucky authorities were investigating a bank robbery. They obtained a search warrant from a state judge for Searp's mother's house. The warrant allowed for an "immediate" search and was issued at 11:27 p.m. Kentucky did not require a showing of good cause for issuance of a

warrant authorizing nighttime service. The search began shortly after midnight. Evidence linking Searp to the crime was found at his mother's house.

Searp was tried in federal court and moved to suppress the evidence because the Kentucky search warrant did not comply with Rule 41(c), Federal Rules of Criminal Procedure, in that it did not specifically authorize nighttime service.

While recognizing that night searches of a person's home are peculiarly offensive, the court in Searp also found that the night search provisions set forth in Rule 41(c) are not "of constitutional statute" (586 F.2d at p. 1124.)

The court further held that suppression should not automatically result from a violation of the rules regarding nighttime service.

The court in Searp decided to

follow the rule announced by the Second Circuit in United States v. Burke (2nd Cir. 1975) 517 F.2d 377, 386-387, where the court held that:

> "[V]iolations of Rule 41 alone should not lead to exclusions unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the rule."

See also United States v. Dauphinee (1st Cir. 1976) 538 F.2d 1.

Neither of the two prongs of the Burke test are present here. Respondents certainly were not prejudiced in the sense that the search would not have occurred had it taken place in the

daytime.

Neither is it apparent that the search would not have been so abrasive had it occurred in the daylight hours. In fact, if the officers had been compelled to approach what amounted to an isolated garrison, there quite possibly could have been more injuries than those sustained when the search was conducted in the early morning hours.

Finally, there is no evidence of any intentional or deliberate disregard of the statute involved. This factor clearly distinguishes the instant case from Call, supra.

The exclusionary rule has been justified on three grounds. (See Note, The Fourth Amendment Exclusionary Rule: Past, Present, No Future (1975) 12 Amer.Crim.L.Rev. 507, 508-512.) First, to vindicate his right to privacy, the

accused has a personal constitutional right to exclude evidence obtained as a result of unlawful searches and seizures directed against him. (See Mapp v. Ohio, supra, 367 U.S. 643, 655-656; Weeks v. United States, supra, 232 U.S. 383, 392-394; Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement (1974) 59 Minn.L.Rev. 251.)

Second, exclusion of unlawfully seized evidence is necessary to deter police misconduct. (Brown v. Illinois (1975) 422 U.S. 590; United States v. Peltier (1975) 422 U.S. 531; Michigan v. Tucker (1974) 417 U.S. 433, 446; United States v. Calandra (1974) 414 U.S. 338, 347; Bivens v.Six Unknown Federal Narcotics Agents (1971) 403 U.S. 388, 413-415 (Burger, D.J., dissenting); Kaufman v. United States

(1969) 394 U.S. 217, 238 (Black, J., dissenting); Desist v. United States (1969) 394 U.S. 244, 249-250, 251; Linkletter v. Walker (1965) 381 U.S. 618, 636-367; Mapp v. Ohio, supra, 367 U.S. at 656; Elkins v. United States (1960) 364 U.S. 206, 217; People v. Cahan (1955) 44 Cal.2d 434, 448; Oaks, Studying the Exclusionary Rule in Search and Seizure (1970) 37 U.Chi.L.Rev. 665, 668-671 [hereinafter cited as Oaks].)

Third, exclusion of unlawfully seized evidence has been deemed necessary to preserve the judicial integrity of the court before which the defendant is being tried. (E.g., Lee v. Florida (1968) 392 U.S. 378, 385; Terry v. Ohio, supra, 392 U.S. 1, 12; Elkins v. United States, supra, 364 U.S. at 222; Olmstead v. United States (1928)

277 U.S. 438, 470, 484-485 (Holmes and Brandeis, J.J., dissenting); see generally, Note, Judicial INtegrity and Judicial Review: An Argument for Expanding The Scope of the Exclusionary Rule (1973) 20 U.C.L.A. L.Rev. 1229.)

This Court has repudiated the personal right theory. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: "[T]he ruptured privacy of the victim's homes and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker (1965) 381 U.S. 618, 637." (United States v. Calandra, supra, 414 U.S. at 347, accord, United States v. Peltier, supra, 422 U.S. 531.)

Before applying the exclusionary rule, a remedial device not expressly mentioned in the Fourth Amendment, this

Court--or any court--must balance its costs against its benefits. (See United States v. Calandra, supra, at 348-351; Kaplan, The Limits of the Exclusionary Rule (1974) 26 Stan.L.Rev. 1027, 1032-1035.) Typically, the competing interests are the value to society of deterring future police misconduct and the cost of freeing without punishment a defendant whose guilt can be proven by the suppressed evidence. (Note, 20 U.C.L.A. L.Rev., supra, at p. 1149.) When the cost is greater than the benefit, the evidence is not excluded. (United States v. Calandra, supra.) It is therefore necessary to assess the deterrent effect of the exclusion of the evidence in this case. "Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose."

(Michigan v. Tucker, supra, 417 U.S. 433, 446.)

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right . . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (Michigan v. Tucker, supra, 417 U.S. at 447; accord, Brown v. Illinois, supra, 422 U.S. at 612 (Powell, J., concurring); United States v. Peltier, supra, 422 U.S. at 537-539.)

Petitioner submits that United States v. Peltier, supra, provides compelling authority for the proposition

that the deterrence rationale could not possibly be served in this case. In Peltier, government agents had conducted a type of search subsequently condemned by this Court in Almeida-Sanchez. Holding that no useful purpose could be served by a retroactive application of Almeida-Sanchez, this Court made the following observations which are extremely helpful in analyzing the case at hand:

> "It was in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval, that border patrol agents stopped and searched respondent's automobile. Since the parties acknowledge that Almeida-Sanchez was the first roving border patrol case to be decided by this Court,

unless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm. [Citations omitted.] If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. Admittedly this uniform treatment of roving border patrol searches by the federal judiciary was overturned by

this Court's decision in Almeida-Sanchez. But in light of this history and of what we perceive to be the purpose of the exclusionary rule, we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car." (United States v. Peltier, supra, 422 U.S. at 541-543; emphasis added; footnotes omitted.)

The reasonable and good faith reliance of the police upon the magistrate's decision that a nighttime search was justified totally undermines any attempt to rationalize the suppression of evidence in this case on the grounds of

deterrence. "Police conduct authorized by a statute which may be unconstitutional, will not be deterred . . . because the police cannot foresee which of the statutes that govern their conduct will be invalidated in the future." (Note, (1972) 47 N.Y.U.L. Rev., 595 at 604.) Therefore, deterrence of future unlawful police conduct, the exclusionary rule's "prime purpose" (United States v. Calandra, supra, 414 U.S. at 347), will not be served by suppression in this case.

Justice Powell has described an arrest under a statute subsequently declared unconstitutional as a mere "technical" violation of the Fourth Amendment. In such a situation, "the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for

depriving the prosecution of reliable and probative evidence." (Brown v. Illinois, supra, 422 U.S. at 612 [concurring opinion].) Just as an officer who has made a reasonable mistake of fact should not be penalized by the application of the exclusionary rule (Hill v. California, supra, 401 U.S. at 804), so also should he not be penalized when he has secured a warrant and reasonably relief upon the magistrate's decision that the search would be lawful as authorized.

Ideally, police should be encouraged to rely on the coordinate branches of government whenever possible while "engaged in the often competitive enterprise of ferreting out crime." (Johnson v. United States, supra, 333 U.S. at 14.) Typically, police are asked to rely upon the assessment of the judiciary in

determining whether probable cause exists to conduct a search. (E.g., United States v. Ventresca (1965) 380 U.S. 102.) In this case, the officers relief upon the magistrate's judicial decision that sufficient cause existed to authorize nighttime service. Suppression of evidence seized under authority of a warrant later invalidated will not deter police misconduct (cf. Brown v. Illinois, supra, 422 U.S. 590 [Powell, J., concurring]); the same must be said of a provision in the warrant authorizing them to conduct the search at nighttime and for the same reason. The officer's reasonable and good faith reliance on the magistrate is not misconduct. Indeed, to the extent that the purposeless suppression of evidence causes confusion among the police it discourages such reliance, and the

exclusionary rule therefore has a negative impact upon law enforcement and civil liberties.

The final rationale for the exclusionary rule is the "imperative of judicial integrity." Many things may be said about this nebulous concept, few of them favorable. It is inconsistent with other Fourth Amendment precedents in several respects. First, a defendant illegally arrested--even kidnapped--may be validly convicted despite the unlawful nature of his seizure. (Gerstein v. Pugh (1975) 420 U.S. 103, 119; Frisbie v. Collins (1952) 342 U.S. 519; Oaks, supra, at 669.)

Second, evidence seized unlawfully by private citizens is admissible in a criminal trial. (Burdeau v. McDowell (1921) 256 U.S. 465.) Third, illegally obtained evidence may be used to impeach

a witness, including the defendant. (Walder v. United States (1954) 347 U.S. 62; cf. Harris v. New York (1971) 401 U.S. 222.) Fourth, and fifth, both the doctrines of "attenuation" (Wong Sun v. United States (1963) 371 U.S. 471, 487-488) and harmless error (Chapman v. California (1967) 386 U.S. 18) are applicable to illegally seized evidence. For other examples where illegally seized evidence may be used in court without violating the concept of judicial integrity, see In re Martinez (1970) 1 Cal.3d 641, 650; People v. Hayko (1970) 7 Cal.App. 3d 604, 610; People v. Rafter (1974) 41 Cal.App.3d 557, 560-561; In re Christopher S. (1978) 80 Cal.App.3d 903.

Thus, a court may constitutionally permit its integrity to be compromised as long as it does not prejudice the

defendant, thus confusing his rights with its obligations. (See Kaplan, 26 Stan.L.Rev., supra, at 1030.) Finally, even this Court's decision to hold prospective in application the cases of Mapp v. Ohio, supra, 367 U.S. 643, and Linkletter v. Walker, supra, 381 U.S. 618, "in effect, ratified police violations of the Fourth Amendment occurring after that amendment was made applicable to the states through the Fourteenth Amendment [in Wolfe v. Colorado]." (Note, 12 Amer.Crim.L.Rev., supra, at 514.)

Not only have the exceptions undermined the rule, but the concept itself, which has never been invoked by the United States Supreme Court as the sole justification to suppress evidence (Oaks, supra, at 669), rests upon a questionable view of the judicial process

and its responsibility to society.

> "The weakness of the judicial integrity argument is that it asks us to be guided by what seems like judicial squeamishness; or, failing that, it asks us to engage in speculation about the remote consequences of judicial complicity in lawless governmental action." (Schrock and Welsh, 59 Minn.L.Rev. at 265.)

Viewed as an end in itself, judicial integrity permits a court to protect its purity by suppressing truth and permitting a guilty defendant to go free. "Is not the court which excludes evidence in order to avoid condoning the acts of the officer by the same token condoning the illegal acts of the defendant?" (Barrett, Exclusion of Evidence Obtained by Illegal Searches--A Comment on People v. Cahan (1955)

43 Cal.L.Rev. 565, 582.)

If suppression of illegally seized evidence is seen as a method of teaching by example (Olmstead v. United States, supra, 277 U.S. 438 [Brandeis, J., dissenting]) or of "minimizing the risk of seriously undermining popular trust in government" (United States v. Calandra, supra, 414 U.S. at 357 [Brennan, J., dissenting]), then the justification for judicial integrity is speculative. "If proponents of the exclusionary rule say judicial lawlessness is a societal menace, the rejoinder is, why not risk that menace rather than the far worse danger of lawlessness in the street?" (Schrock and Welsh, 59 Minn.L.Rev., supra, at 266.)

A more fundamental objection to the doctrine than its dubious premises is its questionable legal foundation.

The Constitution can be searched in vain for a provision which entitles this Court to instruct all other tribunals to defend their integrity by excluding relevant evidence. Of course, this Court, like the California Supreme Court, has inherent supervisory power to direct its lower courts to abstain from participating in the "dirty business" of police misconduct. (Cf. McNabb v. United States (1943) 318 U.S. 332; see generally, Hill, The Bill of Rights and the Supervisory Power (1969) 69 Colum. L.Rev. 181, 193-199.) Indeed, in McNabb, one of the earliest cases to invoke the supervisory power, the court stated that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves

accomplices in willfull disobedience." (McNabb v. United States, supra, 318 U.S. at 345; emphasis added.) It is significant that the italicized language, having the ring associated with the invocation of the doctrine of judicial integrity, is found in a decision which is so closely identified with the concept of supervisory power.

There is also reason to question the continuing validity of the "judicial integrity" doctrine as a ground for suppressing evidence. Thus, the dissenters in Calandra feared that "the Court today discounts to the point of extinction the vital function of the rule that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct." (United States v. Calandra, supra, 414 U.S. 360.) The majority's implicit

premise that deterrence and judicial integrity are inextricably intertwined (Id. at 356, fn. 11) was expressly stated in Michigan v. Tucker, supra, 417 U.S. at 450, fn. 25:

> "This rationale [of judicial integrity], however, is really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent basis for excluding challenged evidence,"

Thus, judicial integrity has been subsumed in the more plausible rationale of deterrence. Despite references to judicial integrity by the majority in Peltier, supra, 422 U.S. at 537, and the hopeful endorsement by the dissenters (Id. at 533, fn. 13), it should now be clear that the only viable purpose of the exclusionary rule is to deter wilful

police misconduct.

To the extent that the imperative of judicial integrity is viable at all, Peltier makes it clear that it does not compel suppression of evidence in this case. That rationale

> "is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held that the conduct of the type engaged in by law enforcement officials is not permitted by the Constitution." (Id. at 539.)

It must also be noted that the imperative of judicial integrity is more than adequately protected in cases where the officer has obtained a warrant in that a judicial officer must review the

officer's request for authorization to conduct a nighttime search before the warrant can issue.

Thus, the courts are afforded an opportunity of protecting their own integrity.

Petitioners therefore submit that given the good faith and reasonable reliance by the police upon the judicially decided validity of their request to conduct a nighttime search manifest that no legitimate purpose of the exclusionary rule would not be served by the suppression of the fruits of the search they conducted and that the evidence must therefore be held to be admissible.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for certiorari must be granted

to settle the substantial and as yet unresolved issues of law presented herein.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General

ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General
Criminal Division

ARNOLD O. OVEROYE
Assistant Attorney General

EDMUND D. McMURRAY
Deputy Attorney General

WM. GEORGE PRAHL
Deputy Attorney General

Attorneys for Petitioners

WGP:rj
9-4-81

A P P E N D I X "A"

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
June 12, 1981
KEVIN A. SWANSON, Clerk
By_____
Deputy

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

WALTER MADISON TUTTLE, et al.,	5 CIV. No.6258
Petitioners,	(Super. Ct. No. 11057)
v.	
SUPERIOR COURT OF SAN LUIS OBISPO COUNTY,	OPINION
Respondent	
THE PEOPLE,	
Real Party in Interest.	

ORIGINAL PROCEEDING. Petition for alternative writ of prohibition. Writ granted.

Laurie Belger, Inc., Laurie Belger and Michael Norris, for Petitioners.

No appearance for Respondent.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Willard F. Jones and Wm. George Prahl, Deputy Attorneys General, for Real Party in Interest.

Petitioners seek a writ of prohibition to prohibit further proceedings in case number 11507 in the Superior Court of the State of California in and for the County of San Luis Obispo, in which petitioners are charged with violation of Health and Safety Code sections 11358 (cultivation of marijuana) and 11359 (possession of marijuana for sale). For reasons hereinafter stated we grant the writ.

Petitioners moved to dismiss the information pursuant to Penal Code section 995. The grounds were: (1) insufficient evidence to support the commitment; (2) nighttime service of a warrant was improper; (3) the warrant was not issued on probable cause; (4) an aerial search was unlawful; and (5) the judge had failed to order disclosure of a material informant. Upon the trial court's denial of the motion to dismiss, petitioners, alleging the same grounds previously set out in the trial court, prayed for a writ of prohibition. We stayed the proceedings in the trial court and issued an order to show cause.

The facts as set forth in the affidavit for a search warrant establish the following:

The affidavit of Garry Wilson (Wilson) discloses that he has been a

special agent with the California Department of Justice for the past nine years and has been assigned to the Bureau of Narcotic Enforcement throughout those nine years.

On July 7, 1980, Wilson was told by Detective Correll of the Santa Barbara sheriff's office that he (Correll) in late June 1980 had been on property belonging to one Don McCormack with McCormack's permission. Correll observed (through 7 power binoculars at a distance of 1500 yards) "a cultivated area that was out of the ordinary." Correll later determined that the cultivated area was on property belonging to Walter Tuttle. Correll is very familiar with "fence lines" in that area and was positive he was not on property belonging to Tuttle. Correll believed that the cultivation was possibly marijuana

due to the unusual nature of the site.

Wilson contacted Special Agent Al Fox (Fox) of the California Department of Justice and arranged for Fox to make an aerial surveillance of the property with Correll. Correll stated to Wilson that "he has received information from other persons that Mike Diener [Diener] has been seen carrying firearms on the property."

On July 10, 1980, Fox, Correll and a lab technician from the Santa Barbara sheriff's office flew over the "suspected property" twice at an altitude of "not lower than 1000 feet." Fox observed a garden area of approximately one-third to one-half an acre containing approximately 100 plants, most of which were about six feet in height. Within a few hundred feet of the garden area was a reservoir containing water. There were

trails leading from the reservoir to the garden area. Tents, "other structures", vehicles and people were also observed. There were trails from the tents and structures to the garden area.

Fox observed that the

> ". . . color, general shape and outline of the plants appeared to be marijuana and that the smaller, lighter green plants appeared to be younger marijuana plants growing among the older larger plants.
>
> "Agent Fox further noted that the suspected plants were not consistent with any natural foliage contained in the area and that the 1/3-1/2 acre parcel did not appear consistent with any legitimate gardening operation. The garden area appeared out of place and isolated. Agent Fox related to your affiant that his observations were made without the aid of any optical devices."

Wilson was also informed by Detective Jeff Trippon of the Paso Robles Police Department that he (Trippon) had received information that Diener had a "cultivation site."

Wilson was able to determine by using county assessor aerial photographs in conjunction with photos taken on July 10, 1980, that the suspected marijuana garden was located on property owned by Walter and Catherine Tuttle.

Wilson also stated in the affidavit:

> "Your affiant is aware that the cultivation of marijuana takes place in the day or night hours and that based on your affiant's nine (9) years in narcotic enforcement that drug distributors often utilize the cover of darkness to conceal their transportation and handling of contraband. Your affiant is also aware that instances of escape and carrying of firearms are becoming more common in the service of search warrants on remote cultivation sites in California. For the above reasons, your affiant requests authorization for service at any time of the day or night which would facilitate the service of the warrant early in the morning hours while residents are still sleeping."

Fox has been assigned to the Bureau of Narcotic Enforcement for ten years and

has considerable experience in the investigation of and identification of marijuana gardens.

Wilson stated in the affidavit:

> "Based on the observations of Agent Al Fox and his expert opinion, it is your affiant's belief that persons in control of the premises fully described on the face of this warrant are currently cultivating marijuana for the purpose of future sale."

At the preliminary hearing Wilson testified he was one of the authorities who executed the search warrant on July 18, 1980. The warrant was executed during the nighttime.

Approximately 560 marijuana plants were discovered growing in the garden area. Additionally, 48 pounds of dry marijuana was found in a tent by the garden. Papers and receipts bearing the names of Tuttle and Diener were found during the search. Irrigation and

gardening equipment, weapons and vehicles were also present at the site.

Wilson testified that in his expert opinion[1/] the cultivation of the marijuana was for the purpose of sale.

Diener and Ronald Enright (Enright) were at the scene when the warrant was executed. The officers were on the premises and "set up" by 5 a.m. At about that time Diener came out of a trailer, looked around and went back into the trailer. Moments later Diener again came out, carrying a double-barreled shotgun. Diener made a motion with the shotgun in the direction of two of the officers who were present to serve the warrant. The officers rolled in opposite directions

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1/ It was stipulated Wilson was an expert and could testify as to possession for sale.

and Officer Mansfield screamed "This is the Sheriff's Department, freeze." Diener continued to move the shotgun and both officers fired. Diener fell to the ground and yelled "Don't shoot."

A few moments later Enright said "I'm coming out." Officer Mansfield was not sure where Enright came from but it was from "the tent area."

A Walter Tuttle and wife are the record owners of the property in question.

SUFFICIENCY OF AFFIDAVITS TO SUPPORT SEARCH WARRANT

Petitioners contend the facts set forth in the affidavit are not sufficient to support the issuance of a search warrant. Petitioners' argument is that the affidavit is insufficient because it does not explicitly state the plants observed were marijuana or that

marijuana would still be present when the warrant was obtained and executed. We disagree. The affidavit disclosed that a marijuana garden of one-third to one-half acre in size was being tended in a remote area on the property in question. Aerial overflights indicated the plants appeared to be marijuana. Agent Fox, a highly experienced and well-trained narcotic agent, so testified. The affidavit was sufficient to support the issuance of a search warrant. Under all the circumstances there was reasonable grounds to believe the plants were marijuana.

AERIAL SURVEILLANCE

The contention by petitioners that the aerial surveillance violated petitioners' reasonable expectation of privacy is without merit. (People v. Joubert (1981) 118 Cal.App.3d 637;

People v. St. Amour (1980) 104 Cal. App.3d 886.)

NIGHTTIME SERVICE

Petitioners argue the showing in the affidavit was insufficient to support nighttime service of the search warrant.[2/] We agree.

This Court said in People v. Watson (1977) 75 Cal.App.3d 592, 598:

> "We conclude that the proper standard for 'good cause' as specified in Penal Code section 1533 is as follows: the affidavit furnished the magistrate must set forth specific facts which show a necessity for service of the

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2/ Penal Code section 1533 provides:

> "Upon a showing of good cause, the magistrate may, in his discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction the warrant shall be served only between the hours of 7 o'clock a.m. and 10 o'clock p.m."

> warrant at night rather than between the hours of 7 a.m. and 10 p.m. This means that the magistrate must be informed of facts from which it reasonably may be concluded that the contraband to be seized will not be in the place to be searched during the hours of 7 a.m. to 10 p.m."3/

The affidavit in the instant case did not furnish such specific facts. No facts were averred which reasonably could lead the magistrate to conclude that the contraband would not have still been on the premises at 7 a.m. As this court said in People v. Wachter (1976) 58 Cal.App.3d 911, 919-920 with respect to a growing crop of marijuana:

> "It can disappear overnight only under the most exceptional circumstances. Even though it be harvested, evidence of its growth will continue to exist in the form of stubble and underground roots.

3/ On the general subject of propriety of nighttime service, see Annotation (1969) 26 A.L.R.3d 951.

It is not comparable to objects that are transitory, movable, easily hidden or consumed."

The affidavit here did not show good cause for a night search. Declarations in the affidavit that "drug distributors often utilize the cover of darkness to conceal their transportation and handling of contraband" and "instances of escape and carrying of firearms are becoming more common in the service of search warrants on remote cultivation sites in California" are too general. A general propensity of drug dealers to dispose of evidence has been held insufficient to justify noncompliance with the knock/notice requirements of the Penal Code. (People v. De Santiago (1969) 71 Cal.2d 18, 28-29 (Pen. Code, § 844); People v. Gastelo (1967) 67 Cal.2d 586, 588 (Pen. Code, § 1531).) Magistrates do not have

authority to endorse excusal of compliance with Penal Code section 1531 on a search warrant. (Parsley v. Superior Court (1973) 9 Cal.3d 934, 938-940.). We conclude a general propensity statement in an affidavit about marijuana cultivators is likewise insufficient to justify noncompliance with Penal Code section 1533.4/

We are not unaware that service of a search warrant may lead to violent confrontation between law enforcement officers and others and that officers

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4/ As noted hereinbefore, it is also stated in the affidavit that Correll told Wilson he had received information from other persons that Mike Diener "has been seen carrying firearms on the property." Without more, that statement would not be helpful to real party in light of the fact that carrying firearms may be fairly common in farm areas. Additionally, there is nothing in the affidavit indicating the person who observed Diener carrying a firearm is reliable.

have a right to defend themselves.[5/]

The crux of this case, however, is that there are no facts within the affidavit which could reasonably allow a magistrate to infer that it was probable the contraband would be moved or the possibility of a violent confrontation lessened by nighttime service.

The affidavit here does not go beyond the nature of the contraband (marijuana) or the type of crime (cultivation) and indicate specifically why in this case nighttime service was needed. The assertions in the affidavit are simply too general in nature. The affidavit does not contain specific, articulable facts showing good cause for

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5/ In fact, in the instant case there was a violent confrontation. Fortunately, no one was killed.

nighttime service. As the court said in People v. Watson, supra, 75 Cal.App.3d at page 597:

> "Because a night service of a warrant is a more serious invasion of the security of a home than a daytime service, the magistrate's exercise of discretion cannot be based solely on the nature of the contraband to be seized or the type of crime involved. Such a generalized rule would be repugnant to the Fourth Amendment requirement of particularity of reasons to justify the violation of the right to privacy."

Watson does not address the matter of safety of officers executing a search warrant. Safety of police officers is of extreme importance and is a factor which may be considered in determining cause for night service. However, just as Watson points out with respect to possible removal of contraband, allegations in an affidavit with respect to safety of officers must inform the magistrate of specific facts

showing why nighttime service would lessen a possibility of violent confrontation, e.g., that the particular defendant is prepared to use deadly force against officers executing the warrant. As we stated with regard to compliance with the statutory requirements of Penal Code section 1531:

> "Compliance with the statutory requirements is excused where the police have reason to believe that a weapon will be used against them if they proceed with the ordinary announcements. (People v. Dumas (1973) 9 Cal.3d 871, 878 [109 Cal.Rptr. 304, 512 P.2d 1208]; People v. Amos (1977) 70 Cal. App.3d 562, 568 [139 Cal.Rptr. 30].)
>
> "However, knowledge that the defendant possesses weapons is insufficient by itself to excuse compliance. (People v. Dumas, supra, 9 Cal.3d at p. 878.) The police must believe the weapons will be used against them, and the belief must be based on specific facts. Hence, unannounced entry cannot be justified by a presumption that all owners of weapons will use them against approaching police officers. (Id., at p. 879.)" (People v. Wollheim

(1978) 87 Cal.App.3d 538, 541.)

In People v. Dumas (1973) 9 Cal.3d 871, 878-879, our Supreme Court said:

> "Police knowledge of the existence of a firearm excuses compliance with announcement requirements only where the officers reasonably believe the weapon will be used against them if they proceed with the ordinary announcements. [Citations.] This belief must be based on specific facts and not on broad, unsupported presumptions. In People v. Gastelo (1967) supra, 67 Cal.2d 586, we held that a presumed propensity of narcotics violators to quickly dispose of contraband is not sufficient to excuse compliance with announcement requirements in every case in which entry is effected to search for narcotics. It is no more acceptable to justify unannounced entry on the basis of a presumed propensity of firearm owners to shoot at approaching police officers in every case in which the police possess information that there are firearms at the location to be entered. We observe that many suspects with no intention whatever of attacking a police officer might have understandable reasons and legal grounds for possessing firearms." (Fn. omitted.)

It is no more acceptable to justify nighttime service on the basis of a presumed propensity of firearm owners to shoot at approaching police officers than it is to justify an unannounced entry on such a basis.

At oral argument, upon the request of the Attorney General, the parties were given the opportunity to brief the issue of whether suppression was compelled as a remedy when good cause for night service is not shown. We have considered those briefs and conclude that suppression is constitutionally compelled when the conditions of the statute are not met.

From the general prohibition against "unreasonable searches and seizures" there is a constitutional limitation upon the time when a search warrant may be executed (see 2 LaFave, Search and

Seizure (1978) § 4.7, p. 113, 116-119; United States ex rel Boyance v. Myers (3rd Cir. 1968) 398 F.2d 896; but see United States v. Searp (6th Cir. 1978) 586 F.2d 1117.)[6/] The nighttime provision of Penal Code section 1533 is a statutory condition which explicates fundamental purposes of the Fourth Amendment of the Federal

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6/ United States v. Searp, supra, 586 F.2d 1117, relies on United States v. Burke (2d Cir. 1975) 517 F.2d 377. A careful reading of Burke shows that it deemed suppression to be an inappropriate remedy for violation of ministerial terms in the federal rule which contains restrictions analogous to Penal Code section 1533. California courts have taken a similar position. (See discussion, infra, fn. 9.) Federal courts do recognize that violation of provisions which protect vital privacy interests (as compared to ministerial provisions) require suppression. (United States v. Burke, supra, 517 F.2d 377, 386, fn. 13; United States v. Manning (2d Cir. 1971) 448 F.2d 992, 1001-1002 ("Knock-notice" violations).)

Constitution and article I, section 13 of the California Constitution (see also Calif. Const., art. I, § 1, on the right of privacy). Time of execution is a significant factor in determining whether or not in a constitutional sense a search is "unreasonable." By adopting Penal Code section 1533, the Legislature has clearly taken note that there is a special threat to privacy presented by nighttime intrusions.7/

The remedy of suppression of evidence because of noncompliance with statutory conditions of execution of

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7/ There was a strong aversion to nighttime searches at common law (see 2 LaFave, Search & Seizure, supra, at p. 119). "[A]fterhours searches are not favored (Parrish v. Civil Service Commission (1967) 66 Cal.2d 260, 267, 57 CR 623, 628), [and] the exercise of this power must be especially closely scrutinized." (Krause, Calif. Search and Seizure Practice (2d ed. 1977) § 3.13, p. 113.)

search warrants is not new. That has long been the remedy after adoption of the exclusionary rule in California. (See, e.g., People v. De Santiago, supra, 71 Cal.2d 18 (Pen. Code, § 844); People v. Gastelo, supra, 67 Cal.2d 586 (Pen. Code, § 1531); Thompson v. Superior Court (1977) 70 Cal.App.3d 101 (search warrant over-broad in description of place to be searched, Pen. Code, § 1529); and People v. Watson, supra, 75 Cal. App.3d 592 (night search, Pen. Code, § 1533.)

With respect to an improper night-time search we are unaware of any California case[8/] holding suppression

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8/ People v. Glass (1976) 56 Cal. App.3d 368, 372, states that Penal Code section 1533 is not a constitutional requirement. The holding in Glass is (continued)

is not the remedy and we are not persuaded that we should so hold. Precedent and sound public policy dictate that we maintain suppression as the remedy for a search which is violative of this

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Fn. 8 continued:

really very narrow. Glass held there was nothing unreasonable or unconstitutional in the legislative determination that search warrants may be executed between the hours of 7 a.m. and 10 p.m. without a showing of good cause. Glass refers to Gooding v. United States (1974) 416 U.S. 430, as being a case in which the United States Supreme Court treated the question of nighttime service of search warrants "solely as one of statutory interpretation." Gooding involved a federal statute. We do not interpret Gooding to be holding that statutes on the subject of nighttime service never rise to the level of a constitutional requirement under the Fourth Amendment. We conclude that Penal Code section 1533 (like Pen. Code §§ 844 and 1531) does have a constitutional base in California.

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statutory condition.[9/]

Under all of the circumstances, we conclude there was no showing of good cause here and the magistrate abused his discretion in authorizing nighttime service. Consequently, all items seized upon the execution of the search warrant before 7 a.m. should be suppressed.

9/ While faiure to comply with ministerial provisions of a statute may not require suppression, the substantive provisions of Penal Code section 1533 do. Penal Code section 1533 was designed to both govern the conduct of officer and to preserve the integrity of the courts. Such aims coincide with the two-fold purposes of the exclusionary rule. (See People v. Blair (1979) 25 Cal.3d 640, 655.) Failure to comply with the good cause requirement of Penal Code section 1533 does require suppression. (Compare Nunes v. Superior Court (1980) 100 Cal.App.3d 915, where we held that an inadvertent failure to initial the nighttime service provision did not invalidate the service; People v. Kirk (1979) 99 Cal. App.3d 89, 94-95, wherein the court held failure to timely file a warrant return did not invalidate the search.)

Because the items which were seized should not have been admitted into evidence, petitioners were illegally committed: The motion to dismiss should have been granted. Without the evidence which was seized, there is insufficient evidence to hold petitioners to answer.10/

Let a writ of prohibition issue prohibiting further proceedings against petitioners or either of them in case number 11507 in the Superior Court of the State of California in and for the County of San Luis Obispo.

(HOPPER)
Acting P.J.

I CONCUR:

(GERRARD)
J.

10/ Petitioners' argument concerning disclosure of an informant need not be addressed in view of our holding concerning the nighttime service issue.

DISSENTING OPINION OF ANDREEN, J.

I respectfully dissent.

Although conceding that the magistrate could not reasonably have found good cause for endorsing the search warrant for night service under Penal Code section 1533, I will attempt to show that the defect does not rise to constitutional magnitude and thus does not require issuance of the writ.

California law holds that the requirement of "good cause" for nighttime service of a search warrant "is essentially a statutory requirement imposed by the Legislature and not a constitutional requirement." (People v. Glass (1976) 56 Cal.App.3d 368, 372.)

In a relatively recent case,

Gooding v. United States (1974) 416 U.S. 430 [94 S.Ct. 1780], the United States Supreme Court construed section 21 U.S.C., section 879, subdivision (a), which reads:

> "A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time."

The construction given by the high court to that statute was that probable cause for the warrant itself is all that is necessary for a nighttime search, and that no special showing is required for a nighttime search other than a showing that the contraband is likely to be on the property. (416 U.S. 430, 454-458 [94 S.Ct. 1780, 1793-1794].) One would think if the matter were one of constitutional magnitude, a different

result would have occurred.

A recent treatise on search and seizure law relies extensively upon the dissent in Gooding and comes to the conclusion that the time of searching an occupied family home is a significant factor in determining whether a search is reasonable for Fourth Amendment purposes. (2 LaFave, Search and Seizure (1978) § 4.7, pp. 116-119.)

LaFave also relies upon United States ex rel. Boyance v. Myers (3d Cir. 1968) 398 F.2d 896. In Boyance, a 2:30 a.m. search was made of an occupied family home pursuant to a search warrant which was limited to "search in the daytime." The court held the nighttime search constitutionally invalid.

According to LaFave only 23 states restrict searches to daytime hours

absent a special showing and authorization. (2 LaFave, supra, § 4.7, p. 116.) The federal courts require special justification in the Federal Rules of Criminal Procedure, rule 41(c), but this rule does not apply to cases involving controlled substances. (Gooding v. United States, supra, 416 U.S. 430 [94 S.Ct. 1780].)

Even more persuasive is the fact that in many jurisdictions, the only showing needed to justify nighttime search is that the affiant is "positive" that the property is at the place to be searched. (See generally, 68 Am.Jur.2d, Searches and Seizures, § 110, p. 764; 79 C.J.S., Searches and Seizures, § 83(c)(2), p. 900; 2 LaFave, supra, § 4.7, p. 116.) And as indicated above, no special showing is necessary for nighttime searches for controlled

substances under federal law.

In California, time for service has been set at the will of the Legislature. Before 1970, Penal Code section 1533 authorized service "in the daytime." In 1970, the statute was amended to allow service at any time between the hours of 7 o'clock a.m. and 10 o'clock p.m.

In a thoughtful and clear decision, the court in United States v. Searp (6th Cir. 1978) 586 F.2d 1117 had before it a search beginning shortly before midnight at the home of the mother of a suspected bank robber. Rule 41(c)(1), Federal Rules of Criminal Procedure, provided that search warrants "shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorized its execution at times other than daytime."

(Id., at p. 1119.) The rule was not satisfied, yet the evidence was not suppressed in the trial court, and the Circuit Court of Appeals affirmed. The court reasoned that the application of the exclusionary rule was not warranted. It held that requiring suppression in all cases would be a remedy out of all proportion to the benefits gained. (Id. at p. 1123.) The court stated at page 1125:

> "When there has merely been a violation of the procedural rules governing night searches, suppression, with its attendant potential for a miscarriage of justice, is not justified when there was neither a possibility of bad faith conduct on the part of the police, nor prejudice to the defendant (in the sense that the search might not have occurred or would not have been so abusive if the requirements of the Rule had been observed). The test is met, and suppression would be required when, based on the facts and circumstances known to the police at the time application was made for

> the warrant, there is a reasonable possibility that permission for a night search would have been refused even if an appropriate request had been made."

Searp cites other circuits which do not invoke the draconian remedy of suppression for every violation of a statutory rule governing the issuance and execution of search warrants. (Id., at p. 1125.)

In the instant case, the officers were concerned with their safety and decided that a nighttime search would reduce the chance of someone being injured. We should recognize their expertise in this area. Concededly their affidavit for a nighttime search is deficient in light of People v. Watson (1977) 75 Cal.App.3d 592. But there is no showing of bad faith on their part. They took their affidavit to a magistrate who, in the exercise of

his discretion, found that the allegations were sufficient. (See People v. Lundy (1969) 2 Cal.App.3d 939, 947, fn. 7: "The determination of good cause for a night search is primarily for the magistrate.") Further, a daytime search, although thought by the officers to be more dangerous than one conducted at night, would have netted the same evidence. Therefore, a violation of the procedure for nighttime searches did not prejudice the petitioners in the sense that more incriminating evidence was obtained.

United States v. Burke (2d Cir. 1975) 517 F.2d 377, 386-387, a case relied on in Searp, held:

> "[V]iolations of Rule 41 alone should not lead to exclusion unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been

> followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." (Fns. omitted.)

Neither of the alternative prongs of the Burke test are present here. Petitioners certainly were not prejudiced in the sense that the search would not have occurred had it taken place in the daytime. Neither is it apparent that the search would not have been so abrasive had it occurred in the daylight hours. In fact, if the officers had been compelled to approach what amounted to an isolated garrison in the daytime, there quite possibly could have been more injuries than those sustained when the search was conducted in the early morning hours.

Finally, there is no evidence of any intentional or deliberate disregard of the statute involved.

The actions of the police in this case did not constitute an "ignoble shortcut to conviction."[1/] They did not reduce the rights under the Fourth Amendment to an empty promise. The mistake herein is a violation of a legislative enactment which, although salubruius, does not lie at the amendment's heart.

It is also of significance that the place searched was a rural encampment. Although tents were there for the use of the guards/cultivators, the place was more akin to a commercial enterprise than a home. (Several cases have stressed the "home" factor in discussing nighttime searches. (See United States ex rel. Boyance v. Myers, supra,

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1/ Mapp v. Ohio (1961) 367 U.S. 643, 660 [81 S.Ct. 1684, 1694].

398 F.2d 896--"occupied family home"; Monroe v. Pope (1961) 365 U.S. 167, 210 [81 S.Ct. 473] (conc. opn. of Harlan, J.)--"dwelling house" and "occupied private home" (Monroe concerned itself with a warrantless search).)

I recognize that this court decided People v. Watson, supra, 75 Cal. App.3d 592, wherein we reversed a trial court's denial of a suppression motion because good cause was not established for the authorization of a night search provision in the search warrant. The case is distinguishable on two grounds: The place to be searched was a private home and the question of whether a violation of Penal Code section 1533 automatically required suppression was not discussed by the court.

The remedy invoked by the majority

is drastic and unnecessary. The use of the exclusionary rule to remedy statutory violations requires an exercise of discretion, not a Pavlovian response. The rule should not be applied where the statutory violation does not reflect on the integrity of the courts or otherwise implement the purposes of the Fourth Amendment.

I would deny the writ.

ANDREEN
J.

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT

4250 State Building

San Francisco, California 94102

August 19, 1981

I have this day filed Order_____

____HEARING DENIED_____

In re: 5 Civ. No. 6258

Tuttle (Walter) Madison

vs.

Superior Court, San Luis Obispo

Respectfully,

Clerk